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CASE NO. 81-2286

in the Supreme Court of the United States

LUIS OSCAR SARMIENTO-PEREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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STATEMENT

On June 14, 1982, the Petitioner herein filed with this Honorable Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

After several extensions of time, the Brief for the United States in opposition was filed. Said Brief was received by counsel for the Petitioner on September 8, 1982.

Petitioner now files with this Court his Reply Brief.

ARGUMENT

POINT I

THE SUPREME COURT OF THE UNITED STATES SHOULD DISREGARD THE VARIOUS ALLEGATIONS MADE BY RESPONDENT IN THAT PORTION OF ITS BRIEF REFERRED TO AS "STATEMENT" IN THAT THESE ALLEGATIONS ARE INACCURATE, AND RESPONDENT RECITES EVIDENCE THAT SHOULD HAVE BEEN EXCLUDED AT TRIAL AND EVIDENCE AND TESTIMONY THAT WAS EXCLUDED AT TRIAL.

Respondent's Brief in Opposition would have this Court believe that Petitioner did not contest the sufficiency of the evidence presented against the Petitioner when the inadmissible confession was included. (See page 2, n. 1, Respondent's Brief in Opposition.)

It is respectfully urged upon this Court that the Brief in Opposition has quoted Petitioner's Brief out of context and thus came to an erroneous conclusion.

Point IV (Pet. App. 17-20) argued to the Court of Appeals that the evidence admitted against Petitioner at trial, aliunde the hearsay, was insufficient to support a conviction. Petitioner went on (Pet. App. 18, 19) to recite the nature of the competent and incompetent evidence introduced against the Petitioner. As part of this recitation, Petitioner cited the alleged confession as an example of the incompetent and inadmissible evidence introduced at trial by the Government and allowed to go to the jury.

Counsel for the Respondent fails to see that Petitioner's argument as to the confession encompassed several points:

1. The confession was used by the Government as its only and crucial piece of substantiai, independent evidence to establish the existence of a conspiracy and Petitioner's participation in said conspiracy. This, of course, violated the proscription of *United States u. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) and *United States u. James*, 590 F.2d 575 C.A. 5 (1979).

2. By permitting the Government to use the confession as aforementioned, the confession became a vehicle which allowed the Government to present to the jury, an overwhelming amount of otherwise inadmissible hearsay evidence against the Defendant, thus the inadmissible hearsay confession "boot strapped" the other inadmissible hearsay testimony.

3. The confession was not a statement made during the course of and in furtherance of the conspiracy, Federal Rules of Evidence 801(d)(2)(E) 28 U.S.C. 8.

In addition to the inaccurate assumptions stated above, the Brief in Opposition then goes on to recite to this Court all the excludable hearsay evidence (Resp. Brief, p.3, ¶ 2). The only direct evidence recited by the Government is:

1. Petitioner met Aguilar and Ybanez at Miami International Airport and drove them to his residence, and

2. Petitioner drove to the parking lot of a Ramada Inn where Aguilar took a box from the trunk of Petitioner's car (Resp. Brief, p.4, 5).

The Respondent, in its zeal to impress the Court, even recites facts that the jury was admonished to disregard. The alleged conversation between Zapata and some unknown person (Resp. Brief p.5) was stricken by the Court (Tr. 298, 299).

POINT II

THE GOVERNMENT HAD AMPLE TIME TO PREPARE ITS CASE AND ESTABLISH A PROPER BASIS FOR THE EVIDENCE IT INTENDED TO INTRODUCE AND/OR INTRODUCE OTHER EVIDENCE OF SIMILAR IMPORT.

The attention of this Honorable Court is respectfully called to Point III of Appellant's Brief submitted to the United States Court of Appeals for the Fifth Circuit (R. App. 1-6).*

It was pointed out to the Court of Appeals and is strongly urged upon this Court that the Government had sufficient notice of the infirmities and/or deficiencies of the evidence in its case and ample time to cure said defects.

One and one-half months before the actual start of trial, counsel for the Government indicated to the Court that it would seek a grant of immunity for Roberto Aguilar. This occurred on June 11, 1979 (R. App. 1). On July 23, 1979, at the pre-trial ("James") hearing and at the trial, the Government still had not obtained immunity for Aguilar, the witness upon which the entire case for the Government rested (R. App. 2, 3).

It has been held that where the prosecution either fully presented its case or had ample opportunity to do

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*Numbers in parentheses preceded by R. App. refer to the Appendix of Petitioner's Reply Brief.

so, the prosecution should be held liable for its failure to adequately meet its burden. That is, the prosecution should be afforded only one fair opportunity to present a prima facie case against a criminal defendant. *United States v. Wiley*, 517 F.2d 1212, 1200 n. 39 C.A.D.C. (1979) (R. App. 456).

In a last comment about the evidence, the Government in its Brief in Opposition, urges this Court to conclude that Petitioner's close association with his brother-in-law and his proximity to a drug transaction is sufficient evidence of Petitioner's guilt beyond a reasonable doubt. (See page 9 n.2 Resp. Brief in Opposition).

In *United States v. Sarmiento-Perez*, 633 F.2d 1092 C.A. 5 (1981) (Pet. App. 32-33), the Court of Appeals stated:

> "DEA surveillance agents observed the defendant Sarmiento-Perez pick up Aguilar and Ybanez at Miami International Airport and drive to Sarmiento-Perez' residence where Aguilar and Ybanez picked up a white Buick and departed. The following evening, agents observed Sarmiento-Perez arrive at the Sheraton Motel, stay a few minutes, then drive to the Ramada Inn parking lot. Shortly thereafter, Aguilar and Ybanez were seen arriving at the Ramada Inn parking lot. Aguilar was observed retrieving a box from the trunk of Sarmiento-Perez' Cadillac. (No evidence—other than the confession referred to below—shows that Sarmiento-Perez had placed this box in the trunk of his car or had reason to know of its

contents.) Thereafter, Aguilar and Ybanez drove from the Ramada Inn parking lot to the Sheraton Motel where the sale was completed and Aguilar and Ybanez were arrested. The box was later found to contain cocaine (pretermitting chain-of-custody and inadmissible, hearsay contentions.)"

It is well established that knowing participation in a criminal enterprise cannot be proven solely by association with other persons involved in said enterprise, family relationships or mere proximity or even actual presence at the scene of a crime. *United States v. Caro*, 569 F.2d 411, 418 C.A. 5 (1978); *United States v. White*, 569 F.2d 263, 268 C.A. 5 (1978).

CONCLUSION

Wherefore, Petitioner prays that the Petition be granted by this Court.

Respectfully submitted,

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